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No. 73-1023

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In the Supreme Court of the United States

OCTOBER TERM, 1973

EVERETT STEAMSHIP CORPORATION, S/A, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner, as husbanding agent[1] for the S.S. Galicia Defender, advanced to the credit of the vessel $20,040.47 for repairs, supplies, and wages for the crew between February 1, 1967 and February 2, 1968. On May 4, 1968, the United States chartered the S.S. Galicia Defender on a demise or "bareboat" basis. On May 17, 1968, petitioner filed in the United States District Court for the Northern District of California a complaint under the Suits in Admiralty Act (46 U.S.C. 741 *et seq.*) seeking *in personam* recovery from the United States in the amount of the advances. The district court granted summary judgment in favor of the

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[1] A "husbanding agent" purchases supplies and stores, advances funds for payment of wages, procures repairs, and in other ways assists a vessel and its master in getting in and out of port.

United States, and the court of appeals affirmed on the ground that the United States could not be held liable *in personam* for the advances (Pet. App. vi-vii).

The nub of this case is petitioner's contention that, since 46 U.S.C. 741 precludes libelants with claims against vessels owned or controlled by the United States from proceeding *in rem* against the vessels, and instead permits those libelants to proceed only *in personam* against the United States under 46 U.S.C. 742, in such *in personam* proceedings the liability of the United States is wholly substituted for the liability of the vessel. But the court of appeals' rejection of that contention does not conflict with the decisions of any other courts, and the issue raised in this case is not of sufficient general importance to warrant further review by this Court.

1. The Suits in Admiralty Act was enacted chiefly to waive sovereign immunity and yet to relieve the United States of the obstruction to its commercial traffic caused by the seizure of its merchant vessels. See *James Shewan & Sons, Inc.* v. *United States,* 266 U.S. 108, 111. The Act specifies that "[n]o vessel owned by the United States * * * shall, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions." 46 U.S.C. 741. Instead of the traditional *in rem* procedure, the Act creates the following remedy: "In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States * * *." 46 U.S.C. 742. Furthermore, "[s]uch suits shall proceed

and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties." 46 U.S.C. 743.

As the courts have long recognized, the Suits in Admiralty Act "merely substitutes a *remedy* in personam for one in rem * * *." *United States* v. *Neptune Line, Inc.*, 12 F. 2d 568, 571 (C.A. 4) (emphasis added). It does not substitute the *liability* of the United States for the *liability* of the vessel. *Ibid.* The Act "gives a libelant no greater right against the United States than he would have against a private party." *McMahon* v. *Pan American World Airways, Inc.*, 297 F. 2d 268, 269 (C.A. 5). Indeed, the Act itself provides that "[t]he United States * * * shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators or agents of vessels." 46 U.S.C. 746.

Accordingly, petitioner, in its *in personam* suit against the United States under 46 U.S.C. 742, could recover only that which it would have been able to recover from a private party who had demise chartered the S.S. Galicia Defender on May 4, 1968, when the United States did so.

2. Had a private party, instead of the United States, demise chartered the S.S. Galicia Defender on May 4, 1968, petitioner would have been unable to recover *in personam* from that party. A demise charterer is generally treated in admiralty as the owner of the vessel from the effective date of the charter. *Reed* v. *The Yaka*, 373 U.S. 410, 412. Hence, on the date the demise charter takes effect the charterer assumes all *in personam* liabilities arising out of the vessel's subsequent operation. Gilmore & Black, *The Law of Admiralty* 218

(1957). However, although the demise charterer acquires the vessel itself subject to its liens, the demise charterer would not assume the *in personam* liabilities of the former owner, absent an express agreement to the contrary. Therefore, had a private party demise chartered the S.S. Galicia Defender on May 4, 1968, that party would not have been liable *in personam* to petitioner for advances made to the credit of the vessel prior to May 4, 1968, although in such a situation petitioner could have enforced its lien covering the advances by proceeding *in rem* against the vessel. It follows that the United States could not be liable *in personam* to petitioner for the advances made prior to May 4, 1968.

Of course, under 46 U.S.C. 742 the United States was answerable to petitioner for the pro rata share to which petitioner would have been entitled in an *in rem* proceeding against the vessel if it had been chartered by a private party, and if the vessel was subject to *in rem* jurisdiction at the time the suit was filed. See *Blamberg Bros.* v. *United States,* 260 U.S. 452. As it happens, the S.S. Galicia Defender was declared off-hire by the United States and sold in an *in rem* proceeding in which petitioner participated. Petitioner recovered its pro rata share in that proceeding, commensurate with the priority of its maritime lien. The court of appeals correctly held that this was all that petitioner was entitled to recover.[2]

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[2]Petitioner's real grievance is that the amount it recovered in the *in rem* proceeding was less than it would have recovered in a similar proceeding at an earlier date, because higher priority liens had accrued in the interim. The court of appeals correctly rejected petitioner's admittedly unprecedented theory that the United States should be held responsible for the loss in value of petitioner's lien, noting that the loss was caused in part by petitioner's delay in pursuing its legal remedies (Pet. App. vi-vii). Cf. *United States* v. *Neptune Line, Inc., supra.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1974.